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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF MERCED,

Plaintiff and Respondent,

v.

AMERICAN MOTORISTS INSURANCE
COMPANY,

Defendant and Appellant.

F044865

(Super. Ct. No. 140131)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. William T. Ivey, Judge. (Retired judge of the superior court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.)

Negele & Associates, James R. Negele and Alice M. Graham for Defendant and Appellant.

Law Offices of Steven J. Hassing and Steven J. Hassing for Plaintiff and Respondent.

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American Motorists Insurance Company (AMIC) appeals from an amended judgment awarding attorney fees and costs to the City of Merced (City) following a court trial in which the court found in the City's favor on its claim to enforce a performance

bond. The court awarded fees for work performed both by the City's outside counsel, who was attorney of record in this action, and by the City's own in-house attorneys, who were not attorneys of record. AMIC contends the court erred in awarding attorney fees because (1) the City did not incur any attorney fees, and (2) the City's in-house attorneys were not attorneys of record in this case and the City did not provide competent evidence of the work they performed. As we shall explain, we will affirm the amended judgment.

FACTUAL AND PROCEDURAL HISTORIES

Following entry of judgment, which found the City to be the prevailing party and authorized amendment of the judgment to include costs and attorney fees, the City filed a motion for an order determining the amount of attorney fees to which it was entitled. By the motion, the City sought \$81,548.75 in attorney fees, consisting of \$9,436.25 for work performed by the City's in-house attorneys and \$72,112.50 for services performed by the City's outside litigation counsel and attorney of record Steven J. Hassing. In the motion, the City noted that the performance bond it sued upon contained the following attorney fees provision: "As a part of the obligation secured hereby and in addition to the face amount specified therefor, there shall be included costs and reasonable expenses and fees, including reasonable attorneys' fees incurred by the City in successfully enforcing such obligation, all to be taxed as costs and included in any judgment rendered."

In support of the motion, the City provided declarations from Thomas P. Guarino, a city attorney who stated he had been actively involved in the handling of this action and verified the time he spent on the matter, as well as the time spent by two former city attorneys, Steven F. Nord and Adam J. Stewart, as reflected in detailed time sheets attached to his declaration, and City Attorney Gregory G. Diaz, who stated he had reviewed the charges and billings in the matter and verified the billings attributable to him were true and correct entries as to the time attributed to his efforts. The City also provided Hassing's declaration, who stated that all time charged by him was necessary in attaining the judgment in this case; that he had not billed the City for work unrelated or

unnecessary to the successful prosecution of this case; the “great majority” of the City’s in-house attorney fees were attributable to Guarino, whose “efforts were particularly valuable and necessary in locating and understanding the City’s records, opposing [AMIC’s] summary judgment motion, responding to discovery, interviewing and preparing witnesses for trial and trial strategy.” Attached to Hassing’s declaration were detailed time records, in the form of an invoice to the City, which showed work performed from March 15, 1998, to August 1, 2003.

AMIC opposed the motion on three grounds: (1) AMIC should not be liable for attorney fees because the City illegally assigned the bond; (2) the City failed to provide contemporaneous records evidencing the attorney fees claimed; and (3) because attorney fees were being sought for time incurred in the handling of a multiplicity of actions, the City must segregate out the fees and costs that apply only to this action. AMIC argued it was “outrageous that [City] now attempts to seek the payment of attorney’s fees incurred by the City Attorney, when the representation was made at all times, that the matter had been transferred over to Campus Vista’s counsel, Steven Hassing, to handle the matter at ‘no costs’ to the City.” AMIC further argued that “[i]n light of the amount of the bond, the attorney’s fees being sought on their face, are unreasonable, particularly, when there are nearly \$10,000 of those fees, are being sought for City Attorneys, who consistently represented to [AMIC], that Mr. Hassing was handling the matter, at no cost to the City.”

In support of the motion, AMIC provided the declaration of its attorney, James R. Negele, in which he stated that Hassing had included in his invoice attorney fees and costs relating to at least two other matters, neither of which should be included in the award of fees in this action; that the claims for attorney fees by the City’s in-house attorneys should be denied in their entirety due to the lack of contemporaneous documentation and because the City was charging for its work in these other actions; and Hassing’s fees should be “reduced significantly” because they include charges which do not relate solely to this lawsuit, and the fees are out of line with the claim against the

bond. Negele further stated that “[AMIC] requests that attorney’s fees in total, be limited to \$50,000 in part, due to complete lack of any contemporaneous billing information from the [City]. Nowhere in the application, are there copies of the billing statements generated by Mr. Hassing to his client in this action. It is clear, that the bills have ‘been made up.’”

The City’s reply stated that the opposition should be construed as meritless because it did not cite any legal basis for denial of the requested fees and only alleged the City sought to recover fees related to other matters without reference to the itemized time records submitted with the motion. The City also filed evidentiary objections to AMIC’s opposition, which included seven objections to statements made in the points and authorities, and nine objections to Negele’s declaration.

The City submitted a second declaration from Hassing, in which he stated that he once again reviewed his billing entries and “affirm that not one dollar billed relates to work done on any case other than” this one. Hassing further stated that during the five years he worked on the case, he kept detailed contemporaneous records of the time spent for each task performed in generating an invoice to the City.

The City also submitted a second declaration from Guarino, in which he stated that he stood by his original declaration that all entries in the time sheets submitted in support of the motion were true and correct and related only to this case; the “large majority” of the entries were for work he performed in his capacity as the city’s attorney, some of which involved court appearances, such as an appearance on the motion to quash the trial subpoenas, which he personally prepared; other entries were directly related to the city attorney’s duties to advise and represent the City, including appearing at the settlement conference; the work actually performed included appearing at and defending a deposition; and other entries reflect “necessary review of motions and documents pertinent to trial issues and other matters necessarily performed by the City’s Attorney.” In a second declaration from Diaz submitted with the reply, Diaz stated he performed the

work relating to the \$40 in fees attributable to him and reflected in the time sheets in relation to this case only.

At the hearing on the motion, the trial court ruled on the City's evidentiary objections, sustaining objections one through five and seven through sixteen, but overruling objection number six. The court awarded the City the entire amount of attorney fees claimed, including those attributable to Hassing and those attributable to the City's in-house attorneys. An amended judgment was entered which included the amount of fees awarded.

DISCUSSION

On appeal, AMIC contends the court erred in awarding attorney fees because (1) the City has admitted it did not incur any attorney fees and (2) the City's in-house attorneys were not the attorneys of record in the case.

With respect to its first contention, AMIC asserts that the City admitted it did not incur any attorney fees in (1) its complaint (by alleging that the City orally agreed with Campus Vista that if Campus Vista performed the deferred work and financed the litigation necessary to enforce the bond, Campus Vista would be entitled to any bond proceeds), (2) a May 11, 1998 administrative report, and (3) an indemnification agreement. AMIC reasons that because Hassing's invoice submitted in support of the motion is undated and covers the entire five-year period of the litigation, and the City admitted it had incurred no fees, the invoice is a "sham." AMIC argues that the City offered no explanation as to why Hassing submitted an invoice to the City in view of the City's admission that the action would be brought at no cost to the City, Hassing was never authorized to incur costs on the City's behalf, and there was no evidence that the City was obligated to pay Hassing. AMIC further argues the trial court ignored evidence in the trial record and pleadings that the City incurred no attorney fees. AMIC concludes that because the City did not incur any attorney fees, none should be awarded.

Whatever the merits of this argument, we need not pass on it because AMIC did not raise it below. “It is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried. Stated otherwise, a litigant may not change his or her position on appeal and assert a new theory. To permit this change in strategy would be unfair to the trial court and the opposing litigant.” (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.) We may, however, consider a new theory “when it is purely a matter of applying the law to undisputed facts.” (*Ibid.*)

This argument necessarily involves an issue of fact, namely whether Hassing was authorized to incur costs on the City’s behalf. While AMIC complains that the City did not present any evidence on this issue, its failure to do so is understandable, given that AMIC did not raise the issue below. Not only did AMIC fail to assert this argument below, it in effect conceded below that the City was entitled to recover Hassing’s fees when it argued that fees should be limited to \$50,000. Moreover, AMIC did not present to the trial court as part of its opposition the documents it now cites to in support of its argument, namely the administrative report and indemnification agreement. One can hardly expect the trial court to make a fully informed decision when the documents necessary to do so were not before it. For these reasons, we conclude AMIC has waived the first issue it raised.

With respect to the second issue, AMIC first asserts, without citation to supporting authority, that because the City’s in-house attorneys were not attorneys of record in this case, it was improper to award attorney fees for their work. We disagree. As explained in *Mix v. Tumanjan Development Corp.* (2002) 102 Cal.App.4th 1318, 1324: “It is not unusual for a litigant to be represented by more than one attorney. For example, a litigant may be represented by both privately retained counsel and in-house counsel. [Citation.] In those cases, a litigant entitled to an attorney fee award may recover attorney fees for both private counsel and in-house counsel, provided the legal services are not unnecessarily duplicative. [Citation.]” No evidence was presented on the motion below

that the City's in-house attorneys did not represent the City in this action, as AMIC now asserts. Accordingly, this claim fails.

AMIC next contends that even if the in-house attorneys represented the City in this action, the City did not provide competent evidence of the work they performed. As the City points out in its brief, AMIC did not object to the City's evidence on this ground below. It is firmly established that an appellate court will not consider erroneous rulings where an objection could have been, but was not, presented to the lower court. (See, e.g., *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417.)

In sum, AMIC's arguments are either waived or are without merit. Accordingly, AMIC has failed to show the trial court erred in its award of attorney fees to the City.

DISPOSITION

The amended judgment is affirmed. Costs on appeal are awarded to the City.

Gomes, J.

WE CONCUR:

Buckley, Acting P.J.

Cornell, J.